No. 12,081

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK EDWARD ALEXANDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

WESLEY BISSEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PHILIP BOCK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

(Continued on Inside Cover.)

PETITION FOR REHEARING ON MOTION TO VACATE AND SET ASIDE ORDERS OF CHIEF JUDGE DENMAN.

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BEN DOBBS,

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vs.

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SAMUEL HARRY KASINOWITZ,

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MIRIAM BROOKS SHERMAN,

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DELPHINE MURPHY SMITH,

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PETITION FOR REHEARING ON MOTION TO VACATE AND SET ASIDE ORDERS OF CHIEF JUDGE DENMAN.

To the United States Court of Appeals for the Ninth Circuit:

The appellants in this matter were adjudged in civil contempt by the trial court and were ordered committed until such time as they answered certain questions which they had previously refused to answer before the Grand Jury. The trial judge denied a stay pending appeal.

The appellants took their appeal and made application to Chief Judge Denman of this Honorable Court for a stay pending appeal. The application was granted and the stay ordered. Thereafter the appellee filed a motion in this Court to set aside the stay of execution, the applica-

tion being based solely on the ground that, on the merits, the stay should have been denied. The motion to set aside the stay was argued before this Court sitting *en banc,* Chief Judge Denman not participating, and was submitted. On the 14th day of March, 1949, by unanimous Court the stay granted by Chief Judge Denman was set aside on the sole ground that a single judge had no power to grant a stay in a civil case, the Court specifically stating that it was not deciding whether a stay on the merits should have been granted.

This petition is directed, therefore, to the question of the power of a single judge of this Court to grant a stay in a civil case on appeal. This petition for rehearing is based upon the following two grounds:

1. The Court incorrectly stated in its opinion that judgments in civil contempt proceedings were "never reviewable by writ of error;" since the law is clear that final judgments in contempt against persons not parties to equity cases were so reviewable, a single judge now has the same power to grant a stay on appeal as he formerly had in a writ of error.

2. The adoption by this Court of both the Federal Rules of Civil Procedure and of the practice of the Supreme Court wherever applicable gives a single judge the power to grant a stay on the appeal of a civil contempt proceeding.

These two points will be considered separately.

1. **The Court Incorrectly Stated in Its Opinion That Judgments in Civil Contempt Proceedings Were "Never Reviewable by Writ of Error;" Since the Law Is Clear That Final Judgments in Contempt Against Persons Not Parties to Equity Cases Were so Reviewable, a Single Judge Now Has the Same Power to Grant a Stay on Appeal as He Formerly Had in a Writ of Error.**

A. Contempt Adjudications Such as the Ones Involved Here Were Formerly Reviewable by Writ of Error.

The provisions of 28 U. S. C. A. Section 861b give the judges of this Court the right to grant a stay on appeal in all cases where under past practices a writ of error would lie. At page 4 of its opinion on the motion to vacate and set aside the orders of Chief Judge Denman, this Court said with respect to said section of the law:

> "This section relates to appeals from judgments formerly reviewable by writ of error. The appeals at bar are from judgments in civil contempt proceedings. Such judgments were never reviewable by writ of error."—(Citing three cases in support of this proposition.)

The authorities cited by this Court do not support the statement; in fact the law is well established to the contrary.

Prior to the abolition of writs of error, appeal was the sole method of review in cases in equity, and the writ of error was the only means of review in cases at law. *Walker v. Dreville,* 12 Wall. 440, 20 L. Ed. 429, 430. A contempt proceeding was considered as being a proceeding in equity if it was directed to a party in an equity case

and its purpose was to enforce an injunction or order in such case. Such contempt proceedings, being considered part of the equity proceedings in which they arose, were reviewable only by appeal. As will be shown by the cases discussed below, *all other contempt cases were considered as proceedings at law and were reviewable by writ of error.*

Some ambiguity in the language of the cases arises out of the confusion that existed on the subject of the distinction between criminal and civil contempts, prior to the fairly recent clarification of that subject. All contempts having punishment as their object are now considered criminal cases; all contempts remedial in purpose are now treated as civil cases. However, some of the early cases refer to all contempts as criminal, except for those remedial contempts directed against parties to equity cases. Therefore, some of the cases say that civil cases are reviewable on appeal only—but those statements appear only in equity cases and are based upon the premise that the only civil contempts are those arising in equity cases. Wherever the courts have actually had to determine the appropriate remedy in contempts, other than those arising in equity cases, they have uniformly held the writ of error to be the appropriate form of review.

The fact that non-equity contempts may have been labeled as criminal in some of the old cases is immaterial here. The use of appeal as against writ of error was never based on the distinction between civil and criminal cases. Rather, appeal was used in equity cases and writ of error in law cases, including, of course, criminal cases. The contempt herein does not arise in an equity proceed-

ing. It is on the law side of the court and it follows that it is the kind of case formerly reviewable by writ of error.

The three cases cited by the Court in support of its position involved contempt orders *in equity cases directed against parties to those cases.* It was held in each of those cases that the contempt orders were part of the equity cases, and therefore reviewable, as other equity cases, only by appeal. Thus, in one of the cited cases, *Cutting v. Van Fleet,* 9 Cir., 252 Fed. 100, at page 101, the Court said:

> ". . . the contempt charged is a civil contempt *arising in connection with a suit in equity for disobedience of an order made to preserve and enforce the rights of a private party, and administer the remedy to which he is entitled, and is therefore reviewable only by appeal."* (Emphasis added.)

The other two cases cited by this Court, *Heinze v. Butte & Boston Consolidated Mining Co.,* 9 Cir., 129 Fed. 274, and *Hanley v. Pacific Live Stock Co.,* 9 Cir., 234 Fed. 522, present identical factual situations and follow precisely the same rule.

The rule applicable to a contempt proceeding of the kind involved here is stated in *Bessette v. W. B. Conkey Company,* 194 U. S. 324, 48 L. Ed. 997, in which a person not a party to an equity suit was adjudged in contempt. The Court said:

> ". . . Considering only such cases of contempt as the present—that is, *cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory*—we are of opinion that there is a right of review in the circuit court of appeals. Such review must, according to the settled law of this court, *be by writ of error."* (194 U. S. 338.) (Emphasis added.)

The case of *Heinze v. Butte & Boston Consolidated Mining Co., supra,* relied upon by this Court itself distinguishes cases like the instant case and indicates that except for contempt cases which are part of equity proceedings, a writ of error was the proper method of review. The case of *Cary Mfg. Co. v. Acme Flexible Clasp Co.,* 2nd Cir., 108 Fed. 873, involved a contempt for violation of an injunction granted in a patent infringement case, the contempt occurring after the injunction had become final. A fine of $2,000 was imposed, one-half of which went to complainant. There, the equity case having been completed, the contempt arising thereafter was held reviewable by writ of error.

In *Butler v. Fayerweather*, 2nd Cir., 91 Fed. 458, an attorney was committed to jail for contempt "in default of answering certain questions propounded to him as a witness in an equity cause [in which he was not a party] pending in the court in which the order was made." The refusal to answer the questions was based upon a claim of privilege arising out of the relationship of attorney and client. A writ of error was granted and the contempt adjudication was reversed. With respect to the propriety of the issuance of the writ of error the Court said:

> "In Re Debs, 158 U. S. 564, 15 Sup. Ct. 900, the defendants in an equity cause were committed for contempt for the violation of a preliminary injunction restraining them from committing the acts to enjoin which the suit was brought, and upon an application to the supreme court for a writ of error the writ was denied upon the ground that the order of committal was not a final judgment or decree. That was a case in which the propriety of the order could have been reconsidered by the court which made it at final de-

cree, and, being an interlocutory order in the progress of the cause, could only be reviewed by the supreme court upon an appeal from the final decree. The case is quite different, however, when a person not a party to the cause is imprisoned or fined for contempt. The order proceeds upon a matter distinct from the general subject of the litigation. The aggrieved party has no opportunity to be heard when the cause is before the court at final hearing, and as to him the proceeding is finally determined when the order is made. Not being a party to the cause, he could not be heard on an appeal from a final decree; and, unless he can be heard by a writ of error, he has no review, but must submit to the determination of the court below, if the court has jurisdiction, however unwarranted it might be by the facts or the law of the case. It would be a reproach to the administration of justice if the statutes of the United States conferring appellate jurisdiction upon this court to review all final decisions of the circuit court failed to provide any means of review to the citizen who has been deprived of his liberty or required to pay a fine without just cause." 91 Fed. 459-60.

In *Flower v. MacGinniss,* 112 Fed. 377, a witness not a party to a case, refused to give a deposition before the cause was at issue. He was cited for contempt and applied for writ of error. The Court said at page 379:

> ". . . The right to a review of the order by writ of error has been challenged, but it is not open to controversy in this court. Our decision in *Butler v. Fayerweather,* 33 C. C. A. 625, 91 Fed. 458, is controlling."

The last three cases discussed above were all cited in the case of *Heinze v. Butte & Boston Consolidated Mining*

Co., supra, one of the cases relied upon by this Court, to support its statement that a writ of error was never available in civil contempt cases.

Furthermore, the rule laid down in the last three cited cases has been followed by the Ninth Circuit in the case of *Morehouse v. Pacific Hardware & Steel Co.,* 9th Cir., 177 Fed. 337. In that case a contempt proceeding arose out of an injunction issued in connection with a bankruptcy case. The Court held that this was a controversy in bankruptcy and not part of the bankruptcy proceedings as such and that, therefore, the writ of error was the proper method of review, citing among other cases *Bessette v. W. B. Conkey Company,* 194 U. S. 324, 48 L. Ed. 997, *supra,* and *Butler v. Fayerweather,* 91 Fed. 458, *supra.*

This rule was finally confirmed by this circuit in the case of *Fenton v. Walling,* 9th Cir., 139 F. 2d 608, 610 (decided after appeal had been substituted for writ of error) where it was held that a "civil contempt order directed toward a person not a party to the suit is final and appealable." The Court in support of this proposition cited the cases of *Bassette v. W. B. Conkey Co.,* 194 U. S. 324, 48 L. Ed. 997, cited above, and of *Nelson v. United States,* 201 U. S. 92, 50 L. Ed. 673. In the latter case, a witness refused to comply with an order to answer questions and produce documents for which he was adjudged in contempt and fined and imprisoned until compliance; the *Nelson* case, in turn, cited the *Bessette* case, *supra,* and *Butler v. Fayerweather,* 91 Fed. 458, cited above.

In each of these cases cited in the *Fenton* case as authority for the proposition that a contempt adjudication is appealable, writs of error had been held to be the

proper method of review. Thus, not only has this Court followed the general rule laid down by the Supreme Court and other courts of appeal that in a case such as this a writ of error was the appropriate method of review, *but it has traced the right to appeal in such cases directly back to those cases in which writs of error were held to be the appropriate method of review.*

The error made by the Court in its opinion on the motion to vacate the stay was that it relied upon cases involving contempt orders directed to parties in equity proceedings, in which cases appeal was the appropriate method of review; the cases cited above establish beyond doubt that a writ of error was the proper method of review for cases such as this. It follows, therefore, that the Court's decision was based upon a fundamental misconception of the authorities. For this reason, if none other, a rehearing should be granted.

B. The Repeal of Sections 1000 and 1007 Revised Statutes Did Not Affect Section 28 U. S. C. 861b (Old) Giving a Single Appellate Judge the Power to Grant a Stay on Appeal.

In its opinion, this Court noted that Sections 1000 and 1007 of the Revised Statutes, 26 U. S. C. A., 1946 Edition, Sections 869 and 874, had been repealed. These are the sections providing that a single judge may grant a stay in a civil case, reviewable by writ or error, which provision was rendered applicable to appeals by 28 U. S. C. A., 1946 Edition, 861b. The repeal of the said Sec-

tions 1000 and 1007, however, does not affect the adoption by the said Section 861b of the practice provided for in said former statutes. In other words, said Section 861b in effect incorporated within it by reference those provisions of said Sections 1000 and 1007 which gave a single appellate judge the power to grant a stay in certain instances. This incorporation was not nullified by the repeal of the statutes which were the source from which the incorporation came.

The adoption of the statute by reference is an adoption of the law as it existed at the time the adopting statute was passed and therefore is not affected by any subsequent modification or repeal of the statute adopted.

Kendall v. U. S. (1838), 12 Peters 524, 9 L. Ed. 1181;

U. S. ex rel. Kessler v. Mercur Corporation (1936), 299 U. S. 576, 81 L. Ed. 424;

U. S. ex rel. Boyd v. McMurty (1933), 5 Fed. Supp. 515;

People v. Whipple (1874), 47 Cal. 592.

"A statute which refers to and adopts the provisions of a prior statute is not repealed or affected by the subsequent repeal of the prior statute. In such case the incorporated provisions, considered as a part of the second statute, continue in force and are unaffected by the repeal."

Spring Valley Water Works v. San Francisco, 22 Cal. 434.

"Prior acts may be incorporated in a subsequent one in terms or by relation, and when this is done, the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication. And the adoption in a local law of the provisions of a general law does not carry with it the adoption of changes afterwards made in the general law."

In re Heath (1892), 144 U. S. 92, 93-4, 36 L. Ed. 358, 359.

"It is well settled that the legislature may define the duties of an officer by referring to another existing statute; and also that a subsequent repeal of the act so referred to does not affect or change the act referring to it. (*People v. Whipple,* 47 Cal. 592.)"

Ventura County v. Clay (1896), 112 Cal. 65, 72.

To summarize, 28 U. S. C. A., 1946 Edition, 861b, adopted the practice set forth in said Sections 1000 and 1007 of the Revised Statutes giving, in cases in which a writ of error was formerly appropriate, a single judge the power to grant a stay on appeal. This power is unaffected by the repeal of said Sections 1000 and 1007. This is a case in which a writ of error would have been proper under the old practice; therefore, a single judge did have the power to grant a stay in this case.

2. The Adoption by This Court of Both the Federal Rules of Civil Procedure and the Practice of the Supreme Court Wherever Applicable Gives a Single Judge the Power to Grant a Stay on Appeal in a Civil Contempt Proceeding.

The rules of this Court contain nothing with respect to stays on civil appeals.

However, the first paragraph of the rules of the Circuit Court of Appeals, Ninth Circuit, reads:

> "The Federal Rules of Civil Procedure, whenever applicable, are hereby adopted as a part of the rules of this Court with respect to appeals and actions of a civil nature."

Title 28, U. S. C., Section 2072 (new) maintains in full force and effect the said Federal Rules of Civil Procedure.

Rule 62(g) of the Federal Rules of Civil Procedure provides that:

> "The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal . . ."

Concededly, as this Court stated in its opinion, this rule does not confer any power on a circuit court judge. But it does recognize the existence of such power. Otherwise, the rule would be meaningless. An examination of the rules of all of the courts of appeal indicates that none of them, by any rule, give a single judge the power to grant a stay. The Supreme Court, therefore, in enacting the said Rule 62(g) must have recognized the existence of the power of a single judge to grant a stay as emanating from some source other than the rules of the circuit courts.

Therefore, said Rule 62(g) is cited not as establishing or creating the power of a single judge to grant a stay but *as a recognition by the Supreme Court of the existence of such power.*

The opinion of this Court deals with what Section 62(g) is not, *i. e.,* a granting of power. It fails to consider what the section does mean. We submit that the Court should consider the meaning of this rule, and, when it does so, the Court should find that the rule constitutes a recognition of the existence of the power of a single judge to grant a stay.

This conclusion is confirmed by the history of the rule which was adopted in 1938 for the purpose of preserving existing powers and laws. *Edmunds, Federal Rules of Civil Procedure,* Vol. 2, p. 1530. At that time, a single judge by virtue of the carry over of the practice formerly prevailing with respect to writs of error did have the power to grant a stay pending appeal. (See Section I of this petition.)

Furthermore, Rule 9 of the Rules of this Court provides:

> "The *practice* shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable."—(Emphasis added.)

Practice obviously is not limited to rules. We have in this case conclusive proof of the practice of the Supreme Court. Mr. Justice Rutledge, acting as circuit justice, in cases of civil contempt presenting substantially identical facts and questions of law, arising out of the Tenth Circuit, granted stays. (See Affidavit in Opposition to Appellee's Motion to Set Aside Stay of Execution.) Thus,

it is the practice of a single justice of the Supreme Court to grant a stay and that same practice has been adopted by this same Court through Rule 9.

In addition, said Rule 9 adopts the practice established by Rule 36 of the Supreme Court Rules. Rule 36 provides that the judge or justice allowing an appeal may grant a supersedeas. In its opinion, this Court disposes of this rule by saying:

> "That practice is inapplicable here; for the appeals at bar were not taken by petition, but were taken by filing notice pursuant to Rule 73(a) of the Federal Rules of Civil Procedure."

This statement ignores the historical background of the Rule. Rule 36 merely sets forth the practice of the Court in effectuating certain statutory provisions, to wit, Sections 1000 and 1007 of the Revised Statutes, 26 U. S. C. A., 1946 Edition, Sections 869 and 874; *Hudson v. Parker,* 156 U. S. 277, 284, 39 L. Ed. 424, 426. Thereafter, the said Sections 1000 and 1007 were applied to Circuit Courts, and the practice of the United States Supreme Court thereunder was made applicable to Circuit Courts, Act of March 3, 1891, 26 Stat. 829, 34 L. Ed. 1128; *Tornanses v. Melsing,* 9 Cir., 106 Fed. 775. Later, the procedure with respect to granting of supersedeas by a single judge was retained when the present method of appeal was adopted. 28 U. S. C., 1946 Edition, 861b. Throughout this period, Rule 36 has been and it is now maintained in effect, with adaptations to the changing procedure for appellate review. (See *Tinkoff v. United States,* 7 Cir., 86 F. 2d 868, 881-2.) Thus, the Rule carried over the power of single judges to grant stays

through and beyond the period in which Circuit Courts were created and appeal substituted for the writ of error.

At all times during its existence, Rule 36 was designed to permit a single judge to grant a stay in civil cases, regardless of changes in the procedure for review. The method of review changed from time to time; the power of a single judge to grant a stay continued in effect throughout. This power in a single judge has never been dependent upon the method of review. It has persisted as each change has occurred. The *practice* which has been and is in effect is to permit a single judge to grant a stay in civil cases where the right to review exists. *This practice is applicable to the Court of Appeals even though the technical method of review has changed.* Rule 9, therefore, does adopt United States Supreme Court Rule 36, for the practice therein formulated is applicable in this Court and to this case for all the reasons set out above. As appears from the *Tornanses* case, *supra,* at page 787, this Court, at one time at least, recognized the applicability of the practice declared in Rule 36.

It should, therefore, be recognized that the historical and present purpose of Supreme Court Rule 36 was and is to give individual judges the power to grant a stay in cases before the Court for review, without regard to changes in the form of review. To do otherwise would be to distort the historical meaning of the statutory provisions and the rule arising therefrom. Although Sections 1000 and 1007 have been repealed, Rule 36 has been retained. Said Rule on the questions of procedure continues in effect the law previously supported by Sections 1000 and 1007. To hold that Rule 9 does not adopt such practice for this Court can be no less than an amendment of this Court's rules for this specific case.

The matters raised herein require the mature reconsideration of the Court. The action of Judge Denman in granting the stay was based upon a number of statutes, rules of court and case law all stemming from a now outmoded and replaced procedure. That which was significant in this law was the principle that to aid the speedy and effective administration of justice, individual judges of the appellate courts had the power to grant stays in connection with allowing writs of error and appeals. Both the later modernizing enactments of the Congress and the present rules are clearly designed to preserve this principle. The Court in its opinion mechanically dissected each of the statutory and rule provisions from which this principle originally developed, and, finding them repealed or superseded, held that the principle had been killed off. We submit that more is needed here than a simple process of dissection. The practice of courts like the law they hand down is not a static body of rules but an organism adapting to changing needs. Thus, the practice here in question, while originally based on Revised Statutes Sections 1000 and 1007, was actually incorporated into an enactment of 1928 which modernized the old method of appellate reviews into a single system of appeals (28 U. S. C., 1946 Ed., Sec. 861b); this practice was preserved in the Federal Rules of Civil Procedure which further modernized the appeals procedure.

A dissection process which points to the repeal of the old R. S. Sections 1000 and 1007, we submit, entirely misses the point. The practice which had developed out of these sections has long since been perpetuated and applied to the new forms of procedure by statutes passed many years later.

Similarly, viewing the power of the individual judge to grant a stay simply in relation to the kinds of review available when R. S. Sections 1000 and 1007 were enacted, again goes wide of the mark. True, the power was created in connection with that procedure but it has been successively applied to the new procedure.

We earnestly submit that the process of analysis called for by this problem is one of understanding the power in its origin and source, comprehending its growth and change, and synthesizing the whole in terms of today's situation. For only a moment's thought will reveal the lengths to which the courts reasoning has taken it. If the present decision stands, then in any civil case where execution of the judgment below might destroy the subject matter of the litigation and the lower court is unable or unwilling to permit a stay by fixing the supersedeas bond, the appellant can not get a stay from this Court unless he can get a hearing before the full court or a duly designated division thereof. Thus, if several judges were ill or on vacation and others were in a remote part of the circuit (say, in Seattle while the litigation was in Los Angeles), the appellant might not be able to preserve the subject matter of the litigation sufficiently to make his right of appeal meaningful. And this might happen while one judge of the court was sitting in the very city where the litigation arose! We are confident the Court intended no such result, for many decades of practice in the federal courts argue against it. The more so here, we submit, because the precious constitutional protections of a free people are subjected to the coercive powers of the court below.

Conclusion.

The Court's opinion is based upon the fundamental misconception that writs of error did not lie in cases such as this. The law to the contrary is clear. In addition, the Court has failed to give consideration to the various rules and statutes from an historical and integrated viewpoint. Finally, the Court has failed to consider the fact that appellants have presented definite proof to this Court that the practice of the Supreme Court (adopted in this Court by virtue of Rule 9) is to permit a single judge to grant a stay in this type of case. For all these reasons this petition for rehearing should be granted.

Respectfully submitted,

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Certificate of Counsel.

I, Ben Margolis, one of the counsel in this case, hereby certify that in my judgment the petition for rehearing is well founded and said petition is not interposed for delay.

BEN MARGOLIS.